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No. 89-67

In the Supreme Court of the United States

OCTOBER TERM, 1989

S. ROBERT DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when petitioner's convictions for mail fraud have been reversed because the indictment was insufficient under *McNally* v. *United States*, 483 U.S. 350 (1987), the Double Jeopardy Clause bars petitioner's retrial under a superseding indictment that is consistent with *McNally*.

2. Whether the Double Jeopardy Clause entitles petitioner to a determination by the court of appeals of the sufficiency of the evidence presented at his prior trial before he can be retried under a superseding indictment.

3. Whether the court of appeals has jurisdiction over petitioner's pretrial appeal from an order denying his motion to dismiss the indictment on the basis of the statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 873 F.2d 900. The opinion of the district court (Pet. App. 20a-50a) is reported at 714 F. Supp. 853. An opinion of the court of appeals in a previous appeal (Pet. App. 69a-73a) is unpublished, but the decision is noted at 841 F.2d 1127 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1989. A petition for rehearing was de-

nied on June 16, 1989 (Pet. App. 51a). The petition for a writ of certiorari was filed on July 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted in 1986 on four counts of mail fraud. The court of appeals reversed the convictions, holding that the indictment was invalid under *McNally* v. *United States*, 483 U.S. 350 (1987). The grand jury returned a superseding indictment alleging a theory of mail fraud consistent with *McNally*, and the district court denied petitioner's motions to dismiss the indictment under the Double Jeopardy Clause and the statute of limitations. Petitioner sought interlocutory review. The court of appeals affirmed the district court with respect to petitioner's double jeopardy claim; it dismissed his appeal from the pretrial denial of his statute of limitations defense, finding that it lacked jurisdiction with respect to that claim; and it denied a petition for a writ of mandamus challenging the district court's order on the statute of limitations defense.

1. The original indictment alleged that petitioner devised a scheme to defraud the citizens of Upper Arlington, Ohio, of their right to honest and faithful services from their public officials. Petitioner was charged under 18 U.S.C. 1341 with four counts of mail fraud, corresponding to four mailings alleged to have occurred between June 18, 1981, and August 13, 1981. Pet. App. 62a-68a.

Petitioner, who is a real estate developer, owned a house and a tract of vacant land, which he intended to subdivide, in Upper Arlington. Originally, the city planned to construct a public waterline to the area. The city estimated that the line would cost approxi-

mately $80,000, of which petitioner's share would have been approximately $60,000. Pet. App. 2a.

Prior to the start of the construction of the public waterline, petitioner contacted Harold Hyrne, Upper Arlington's city manager, and agreed to install the waterline at his own expense. The theory of the prosecution, as reflected in the original indictment, was that petitioner and Hyrne agreed that petitioner would submit—and that Hyrne would not question—an inflated cost certification for the project. Under a city ordinance, abutting property owners are allowed to tap into such a waterline without the builder's consent if they pay the builder a "tap-in" charge fixed by the city manager on the basis of the builder's cost. Thus, the inflated certification would result in correspondingly inflated tap-in charges payable to petitioner. As part of this scheme, the indictment alleged, petitioner was to provide Hyrne with a credit toward the purchase of certain common stock. See Pet. App. 63a-64a.

The government's evidence at trial tended to show that petitioner had the waterline installed for a contract price of $36,296.54, but provided Hyrne with a false statement showing a cost of $71,472 and reflecting the purchase of items that were not actually installed. On the basis of the $71,472 figure, Hyrne assessed Richard Schultz, one of petitioner's neighbors, a tap-in fee of $3100 per acre. Pet. App. 2a-3a, 14a-15a; Gov't C.A. Br. 16-17. The mailings on which the mail fraud counts were based were alleged to have taken place in connection with the collection of this fee from Schultz. Pet. App. 66a-68a. After a jury trial, petitioner was convicted on all four counts.

2. On appeal from the convictions, the court of appeals reversed and remanded with a direction to

dismiss the indictment. Pet. App. 69a-73a. Relying on this Court's decision in *McNally*, the court of appeals concluded that the indictment "[did] not properly allege a violation of the mail fraud statute," *id.* at 71a, since it did not aver that "the purpose or result of the scheme was to obtain money or property for the defendant," *id.* at 72a. The court did not reach petitioner's contention that the evidence was insufficient to sustain his conviction.

3. Ten days after the district court dismissed the original indictment in compliance with the court of appeals' mandate, the grand jury returned a superseding indictment. Pet. App. 55a-61a. The allegations of the superseding indictment were substantially the same as those of the original indictment, except that the superseding indictment alleged a "scheme or artifice to defraud, and to obtain money by means of false and fraudulent pretenses," *id.* at 55a, rather than to deprive Upper Arlington of the honest services of its officials.

Petitioner moved to dismiss the superseding indictment on the grounds, *inter alia*, that it was barred by the Double Jeopardy Clause and the statute of limitations. The district court denied the motion. Pet. App. 20a-50a. It concluded that the Double Jeopardy Clause did not bar a new trial because petitioner's convictions had not been reversed for insufficient evidence. *Id.* at 34a. The court held that the superseding indictment was timely under 18 U.S.C. 3288, which extends the period of limitations for six months when an indictment is dismissed on various enumerated grounds. Pet. App. 34a-38a.

4. Petitioner noticed an appeal from the district court's order insofar as it denied his motion under the Double Jeopardy Clause and the statute of limi-

tations, and he filed a petition for a writ of mandamus with respect to the latter issue. The court of appeals affirmed as to the Double Jeopardy Clause, dismissed for lack of jurisdiction as to the statute of limitations, and denied the petition for a writ of mandamus. Pet. App. 1a-19a.

a. The court of appeals held that its earlier decision reversing petitioner's convictions because of a defect in the original indictment did not foreclose a new trial under a valid superseding indictment. It noted that in *Burks* v. *United States*, 437 U.S. 1 (1978), *Montana* v. *Hall*, 481 U.S. 400 (1987), and *United States* v. *Scott*, 437 U.S. 82 (1978), this Court has established a general rule that a reversal on appeal for any reason other than insufficiency of the evidence does not bar a retrial. Pet. App. 7a. Distinguishing its decision in *Saylor* v. *Cornelius*, 845 F.2d 1401 (6th Cir. 1988), the court of appeals found no reason to depart from that rule based upon the facts of this case.[1] The panel observed that the decision to charge petitioner on an intangible rights theory was "perfectly legitimate when made, the intangible rights theory having been endorsed by [the Sixth Circuit] only weeks before in the very case that was ultimately to produce the *McNally* decision." Pet. App. 9a-10a. The court also noted that "[t]he prosecutor gained no unfair advantage by limiting the

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[1] In *Saylor*, apparently as a result of an oversight by the prosecutor, the jury was not instructed on the theory of criminal responsibility that the prosecution had proved at trial. The conviction was reversed because there was no evidence to support the theory that was submitted to the jury. The Sixth Circuit held that under these circumstances the defendant could not be retried on the theory on which the jury had not been instructed.

indictment * * * to an intangible rights theory" and that the circumstances of this case did not present a "potential for prosecutorial abuse" as in *Saylor*. *Id.* at 10a.

The court of appeals declined to determine whether the evidence admitted in petitioner's trial would have been sufficient to support a conviction under the intangible rights theory alleged in the original indictment or under the money or property theory on which petitioner was not tried. Pet. App. 12a-15a. The court added, however, that it did not think that the case presented at the prior trial "would have been frivolous under a 'money or property' indictment." *Id.* at 15a. Its "initial impression," which it noted was not to bind the district court, was that petitioner's contentions raised issues of fact. *Ibid.*

b. The court found that it lacked jurisdiction to review the denial of petitioner's statute of limitations claim, concluding that the district court's order on that issue would not be effectively unreviewable on appeal from a final judgment. Pet. App. 17a-19a. The court rejected petitioner's contention that the statute of limitations confers a right not to be tried that would be irretrievably lost if the appeal were not heard. It explained that statutes of limitations "acknowledge the state's right to try certain persons, but then set boundaries on the exercise of that power." *Id.* at 17a (quoting *United States* v. *Levine*, 658 F.2d 113, 127 (3d Cir. 1981)).

ARGUMENT

1. In *United States* v. *Ball*, 163 U.S. 662 (1896), this Court held that the Double Jeopardy Clause did not bar a defendant's retrial on a charge of murder after his conviction had been reversed because of a defect in the indictment. Similarly, in *Montana* v. *Hall*, *supra*, the Court concluded that a defendant could be reprosecuted after his first conviction had been reversed because the indictment was based on a statute that did not apply to his actions at the relevant time. These cases exemplify a "venerable principle[]" of double jeopardy jurisprudence: "The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, * * * poses no bar to further prosecution on the same charge." *United States* v. *Scott*, 437 U.S. at 90-91. Accord, *e.g.*, *Burks* v. *United States*, 437 U.S. at 13-14.

That principle governs this case. Petitioner's prior convictions were reversed because of a deficiency in the original indictment, not because of insufficiency of the evidence. Thus, as the court of appeals found, petitioner may properly be retried. "It is clear," as this Court said in *Montana* v. *Hall*, 481 U.S. at 404, "that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument."

Petitioner advances two grounds which, he contends, justify a different result on the facts of this case. As the court of appeals determined, both are without merit. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals, and it does not otherwise warrant this Court's review.

a. Petitioner argues that a new trial should be barred because the government was "responsible" for the reversal—*i.e.*, because it "deliberately" or "intentionally" tried petitioner on an indictment alleging an intangible rights theory of mail fraud in the face of petitioner's claim that such a theory was invalid. Pet. 15-22.

Setting aside petitioner's pejorative terms, this case is no different from virtually any other in which an appellate court holds that an indictment is defective. There is nothing unusual or unseemly about a case in which a defendant challenges the indictment by means of a pretrial motion to dismiss, the prosecution opposes the motion, the trial court denies it, and the case proceeds to trial and judgment of conviction. In any such case, it could be said that the prosecutor is "responsible" for the reversal because he has "deliberately," "intentional[ly]," and "obstinately" (*e.g.*, Pet. 15, 17, 19, 21) pursued an indictment after being placed on notice that it might later be held invalid. The position that petitioner advocates—which would bar a retrial when the prosecution has "chose[n] to rely on an invalid theory" in place of "a valid theory that was previously available but deliberately not pursued" (Pet. 15)—would effectively swallow the general rule of *Ball* and *Montana* v. *Hall*, *supra*.

By any objective measure, moreover, the decision to charge petitioner on the theory set out in the original indictment was entirely reasonable. On May 12, 1986, the Sixth Circuit upheld mail fraud convictions based on an indictment that alleged that the defendants had devised a scheme to defraud a State and its citizens of their right to honest government. *United States* v. *Gray*, 790 F.2d 1290 (1986), rev'd

sub nom. McNally v. *United States*, *supra*. The court of appeals noted in that case that "[c]ourts have long interpreted the mail fraud statute * * * as proscribing schemes to defraud the citizens of their intangible rights to honest and impartial government," citing decisions from five other circuits for that proposition. 790 F.2d at 1294. One month later, the grand jury returned an indictment against petitioner charging him on precisely the same theory that was approved in *Gray*. As the court of appeals stated here, that charging decision "was perfectly legitimate when made." Pet. App. 9a.

In any event, nothing in this Court's cases or double jeopardy principles suggests that the permissibility of a retrial should turn on whether an indictment, even though approved by the trial court, can be characterized as the product of a deliberate decision not to charge an available theory of criminal culpability. This much is clear from cases addressing mistrials granted on the defendant's motion. In that situation, the defendant may be retried unless "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Oregon* v. *Kennedy*, 456 U.S. 667, 679 (1982). That rule reflects the fact that a defendant who successfully moves for a mistrial is deemed to have relinquished his right to have his case concluded in a single trial; the only exception is for conduct that is so egregious that the defendant is effectively compelled to forgo that right. See *id.* at 673.

In a case like this one, the same general rule should apply. A defendant who moves for dismissal of an indictment and, after the motion is denied, preserves the point and successfully raises it on appeal, has

renounced his right to have his case concluded in a single trial. The Court reached a similar conclusion in a similar setting in *Lee* v. *United States*, 432 U.S. 23, 33 (1977). There, the defendant moved prior to attachment of jeopardy for dismissal of an information on the ground that it failed to allege specific intent. The trial court withheld decision until the close of the evidence and then granted the motion. This Court held that the case was controlled by decisions governing the permissibility of retrials following defendants' motions for mistrials. It relied on the fact that the defendant had not withdrawn the motion or otherwise suggested that it should not be determined. 432 U.S. at 34. Here, petitioner not only failed to withdraw his motion, but raised the insufficiency of the indictment on appeal.[2]

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[2] The concern that justified the recognition of the narrow exception to the general rule at issue in *Oregon* v. *Kennedy*, *supra*, is absent in the present setting. While there may be instances in which a prosecutor seeks to provoke a mistrial in order to secure a different jury, to obtain additional evidence, or to revamp trial strategy, he would have no conceivable reason to provoke the reversal of a conviction by preparing an indictment that is purposely insufficient. Even assuming that he could count on the indictment's passing muster in the trial court, a prosecutor who considered such a course could anticipate achieving either an acquittal barring retrial or a reversal on appeal that would place him back before the grand jury. There is no risk to the defendant's interests that might justify a rule requiring courts to assess the extent to which a prosecutor is at fault for an indictment determined on appeal to have been defective. Thus, reversal of the court of appeals' decision is not necessary to assure that there will be some "limit to the number of successive prosecutions the government can bring against a criminal defendant using superseding indictments that embrace the same events" (Pet. 15). See Pet. App. 10a (noting that there is no "potential for

b. Petitioner also contends (Pet. 8-15) that the Double Jeopardy Clause entitles him to a determination whether the evidence introduced at his trial was sufficient to sustain a conviction for mail fraud. The court of appeals correctly rejected that contention, emphasizing that petitioner's conviction had been reversed because of the defect in the indictment.

When an indictment has been dismissed because it fails to allege a valid legal theory, as in this case, it is "pointless" to determine whether the evidence would have sustained a conviction on the invalid theory. The question whether the government has proved a state of facts that does not constitute a crime has no legal significance and cannot properly control the applicability of the Double Jeopardy Clause. Moreover, it would be unjust to the government to test the evidence against whatever theories might have been alleged in a valid indictment. It is well established that a defendant may not "be tried on charges that are not made in the indictment against him." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960). Thus, the evidence that was introduced in a trial based upon an invalid indictment does not necessarily reflect the evidence that might be elicited at a trial on a valid superseding indictment. When a conviction is reversed because of a defect in the indictment, the government has not necessarily had its "one fair opportunity to offer whatever proof it could assemble," *Burks* v. *United States*, 437 U.S. at 16, and the public's interest in a determination of

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abuse" in this setting). No decision of which we are aware suggests that the Double Jeopardy Clause entitles a defendant to that kind of determination. And in any event, whatever the legal merits of such an approach might be, it could not conceivably bar a retrial on the facts of this case.

whether the defendant has committed a crime has not been satisfied.

No decision of this Court has addressed the precise question presented by this case. However, in *Richardson* v. *United States*, 468 U.S. 317 (1984), the Court held that when a prosecution ends in a mistrial because of a hung jury, a defendant is not entitled to a review of the sufficiency of the evidence before he is retried. The Court rejected the contention that the reasoning of *Burks* requires that type of review. Rather, the Court explained, *Burks* held only that "once a defendant obtained an unreversed appellate ruling that the Government had failed to introduce sufficient evidence to convict him at trial, a second trial was barred by the Double Jeopardy Clause." 468 U.S. at 323. The Court made clear that *Burks* did not "[lay] down some overriding principle of double jeopardy law that was applicable across the board in situations totally different from the facts out of which it arose." *Ibid.* The Double Jeopardy Clause did not entitle a defendant to a determination of evidentiary sufficiency in *Richardson*, the Court concluded, because the protection of the Clause "by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." 468 U.S. at 325.

The reasoning of *Richardson* is controlling here. A reversal on appeal based upon a defect in the indictment is no more the equivalent of an acquittal than is a mistrial based upon a hung jury. In terms of the language of the Double Jeopardy Clause and the interests it serves, it is hard to imagine how a defendant who has no right to a determination of the sufficiency of the evidence introduced against him when a jury is deadlocked would be entitled to such a determination when he is convicted and his con-

viction is reversed because of an error in the charging instrument. Surely, the defendant has no greater interest in a determination of the sufficiency of the evidence against him in that situation than in *Richardson*, and the public's interest in an error-free determination of the defendant's guilt is in no way diminished. See *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). There has been no "event" equivalent to an acquittal that might be said to change the nature of the defendant's "jeopardy." Thus, the court of appeals' decision on this point follows from *Richardson*.

Contrary to petitioner's suggestion (Pet. 11-12), *Lockhart* v. *Nelson*, 109 S. Ct. 285 (1988), does not support a different conclusion. In *Lockhart*, the Court held that when a conviction is reversed because evidence has been erroneously admitted, the fact that the remaining evidence is insufficient to sustain a conviction does not bar a new trial. The Court explained that if the trial court had made the correct evidentiary ruling at trial, the prosecutor would have had an opportunity to offer additional evidence that was available. Thus, the Court reasoned, requiring an appellate court to consider the erroneously admitted evidence "recreates the situation" that would have occurred if the trial court had ruled correctly. *Id.* at 291. Here, similarly, if the trial court had correctly foreseen this Court's *McNally* decision and dismissed the indictment, petitioner's retrial would have been permitted without a determination of evidentiary sufficiency even if the dismissal had occurred after the close of the evidence. See *Lee* v. *United States*, *supra*; *Richardson* v. *United States*, *supra*. Contrary to petitioner's contention (Pet. 11-12), *Lockhart's* summary of *Burks* (109 S. Ct. at 290) cannot be read to resurrect the proposition that this

Court laid to rest in *Richardson*—*i.e.*, that *Burks* implicitly entitles a defendant to review of the sufficiency of the evidence before a retrial whenever the trial court could have, but did not, enter a judgment of acquittal.

There is no conflict between the decision of the court below and decisions of other courts of appeals. The petition does not cite any case—and we are aware of none—in which a court of appeals has reversed a conviction because the indictment failed to charge an offense, but the court has nevertheless reviewed the sufficiency of the evidence.[3] There are

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[3] Petitioner is mistaken in his assertion (Pet. 14 & n.20) that *United States* v. *Snell*, 592 F.2d 1083 (9th Cir.), cert. denied, 442 U.S. 944 (1979), and *United States* v. *Hayes*, 676 F.2d 1359, 1363 n.1 (11th Cir.), cert. denied, 459 U.S. 1040 (1982), were cases of that type. In *Snell*, two defendants were convicted of conspiracy to commit bank robbery and attempted extortion, but the extortion convictions were reversed on appeal on the ground that any substantive offense that they had committed was chargeable, if at all, under the bank robbery statute. *United States* v. *Snell*, 550 F.2d 515 (9th Cir. 1977). In that appeal, the Ninth Circuit did not address the sufficiency of the evidence to sustain the extortion offense that had been charged. See *id.* at 519 (finding "ample evidence to support the convictions for conspiracy"). The court expressed no opinion on whether the evidence would have sustained a conviction for a substantive bank robbery offense, adding that "[w]hile we can speculate that Schmidt and Snell would likely have been convicted of attempted bank robbery under 18 U.S.C. § 2113(a), we obviously cannot convict them of an offense for which they were not charged or tried." *Id.* at 518. On remand, one of the defendants was charged with attempted bank robbery, and the district court dismissed the indictment, ruling that it was barred by the Double Jeopardy Clause. The Ninth Circuit reversed and reinstated the new indictment. In a footnote, the court explained that *Burks* presented no bar to a new trial since (as in this case) the

decisions, including at least one from the Sixth Circuit, that suggest that an appellate court should pass on the sufficiency of the evidence when it finds other forms of reversible error—for instance, in the admission of evidence, jury instructions, or other trial proceedings.[4] Those decisions do not, however, sug-

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prior reversal had been on grounds other than the sufficiency of the evidence. 592 F.2d at 1085 n.2. The court did not assess the sufficiency of the evidence on the reversed count in either appeal, and it did not suggest in any way that it was required to do so. *Snell* thus provides no support for petitioner's position.

The proceedings in *Hayes* followed a similar course. The court of appeals reversed a defendant's conviction because of a defect in the indictment and, in a subsequent appeal, rejected the claim that the Double Jeopardy Clause barred a new trial on a valid indictment. 676 F.2d at 1360-1361, 1362-1364. Neither that decision nor the prior decision, *United States* v. *Meacham*, 626 F.2d 503 (5th Cir. 1980), addressed a sufficiency of the evidence claim or suggested that the Double Jeopardy Clause entitled the defendant to such a determination.

In short, the decisions in this case, in *Snell*, and in *Hayes* are entirely consistent. In all three cases, the court of appeals reversed convictions because of a defect in the indictment and held that new trials were permitted without first assessing the sufficiency of the evidence introduced in the prior trials.

[4] See, *e.g.*, *United States* v. *Douglas*, 874 F.2d 1145, 1149-1151 (7th Cir. 1989) (erroneous jury instructions); *United States* v. *Morris*, 612 F.2d 483, 491-492 (10th Cir. 1979) (error in jury poll); *Palmer* v. *Grammer*, 863 F.2d 588, 591-592 (8th Cir. 1988) (erroneous admission of evidence); *Vogel* v. *Pennsylvania*, 790 F.2d 368, 376 (3d Cir. 1986) (split decision involving placement of burden of proof on insanity); *United States* v. *Hodges*, 770 F.2d 1475, 1477 (9th Cir. 1985) (erroneous admission of evidence); *United States* v. *Bibbero*, 749 F.2d 581, 585 (9th Cir. 1984) (failure to turn

gest that the permissibility of retrying a defendant whose conviction has been reversed based upon a defect in the indictment should depend on whether the evidence was sufficient to prove a state of facts that the court of appeals has determined is not a crime—or to establish a crime that was not charged.

2. Finally, petitioner contends that the denial of his motion to dismiss the indictment based upon the statute of limitations was immediately appealable under the collateral order doctrine. Pet. 22-27. There is no legal support for his claim. The only other court of appeals that has addressed the issue has agreed with the court in this case that orders of that type are not subject to appeal before a final judgment has been entered. *United States* v. *Levine*, 658 F.2d 113 (3d Cir. 1981); *United States* v. *Cerilli*, 558 F.2d 697, 699-700 (3d Cir. 1977). These decisions are entirely consistent with the general principles that this Court has established to limit interlocutory appeals in criminal cases. Further review of this question is not warranted.

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over Jencks Act material), cert. denied, 471 U.S. 1103 (1985); *United States* v. *Palzer*, 731 F.2d 1484 (11th Cir. 1984) (jury erroneously instructed to continue deliberating and return a unanimous verdict); *United States* v. *Sneed*, 705 F.2d 745, 748-749 (5th Cir. 1983) (error in jury selection procedures); *Delk* v. *Atkinson*, 665 F.2d 90, 92-93 (6th Cir. 1981) (unspecified trial errors); *United States* v. *Marolda*, 648 F.2d 623 (9th Cir. 1981) (jury instructions that varied from offense charged in the indictment). The courts of appeals are not in complete agreement as to whether the Constitution, as opposed to prudential considerations, mandates consideration of a claim of evidentiary insufficiency where a conviction must be reversed because of trial error. See *United States* v. *Douglas*, 874 F.2d at 1149-1151.

The delay inherent in interlocutory appeals is "particularly damaging to the conduct of criminal cases." *DiBella* v. *United States*, 369 U.S. 121, 124 (1962). Accord *United States* v. *MacDonald*, 435 U.S. 850, 853-854 (1978) (excessive delay is " 'fatal to the vindication of the criminal law' "). Thus, the presumption against piecemeal review "is at its strongest in the field of criminal law," *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982), and this Court has "interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases." *Flanagan* v. *United States*, 465 U.S. 259, 265 (1984).

Considered as a class, as they must be,[5] orders denying motions to dismiss an indictment on the basis of the statute of limitations have none of the three characteristics that are required to make them immediately appealable. See *Midland Asphalt Corp.* v. *United States*, 109 S. Ct. 1494, 1497-1498 (1989). As the Third Circuit noted in *Levine*, 658 F.2d at 121, such orders usually do not conclusively resolve a statute of limitations defense, since "the pretrial rejection of a limitations defense normally would not

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[5] This Court has repeatedly made clear that the appealability of pretrial orders cannot turn on the facts of a particular case. See, *e.g.*, *Van Cauwenberghe* v. *Biard*, 108 S. Ct. 1945, 1953 (1988); *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 438-440 (1985); *United States* v. *MacDonald*, 435 U.S. at 857-858 n.6. Thus, the fact that this case involves a dispute that turns on the interpretation of a statute, 18 U.S.C. 3288, and that can be determined on the face of the indictment, does not control the issue of appealability. In *Levine*, the Third Circuit properly refused, for instance, to define cases in which the expiration of the statute of limitations was manifest on the face of the indictment as a separable class for purposes of the collateral order doctrine. 658 F.2d at 120.

preclude the defendant from raising such a claim again should it appear in the course of trial that the government failed to carry the burden of proving that certain acts occurred within the statutory period." For related reasons, the issues presented by a statute of limitations are ordinarily not completely separate from the merits of an action. The main issue in a criminal proceeding is whether the government has proved that the defendant committed any of the crimes alleged in the indictment; the issue under the statute of limitations is the closely related one of whether, if any of the crimes occurred, they were committed within the limitations period. Finally, as the Third Circuit found, the denial of a pretrial motion to dismiss on statute of limitations grounds is not effectively unreviewable on appeal. The interests served by statutes of limitations may be effectively vindicated in an appeal from a final judgment. See *United States* v. *Levine*, 658 F.2d at 127-129. Those interests are comparable to those protected by the Speedy Trial Clause of the Constitution, which this Court has held does not "encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all." *United States* v. *MacDonald*, 435 U.S. 850, 861 (1978). "[L]imitations statutes acknowledge the state's right to try certain persons, but then set boundaries on the exercise of that power." *United States* v. *Levine*, 658 F.2d at 127.

In this case, the court of appeals found it necessary only to address the third element of the collateral order doctrine. It determined, consistent with *Levine*, that the denial of petitioner's pretrial statute of limitations motion would not be effectively unreviewable on appeal. Pet. App. 16a. Petitioner's attack on this

ruling focuses on the language of the statute of limitations, 18 U.S.C. 3282, which provides that "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." Relying on *Midland Asphalt Corp.* v. *United States*, 109 S. Ct. at 1499, he contends that the language of Section 3282 confers "[a] right not to be tried in the sense relevant to the *Cohen* exception," *i.e.*, "an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause * * * or the Speech or Debate Clause."

This argument misreads the Court's opinion in *Midland Asphalt*. The issue under the third prong of the collateral order doctrine is whether the order in question "involve[s] an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States* v. *MacDonald*, 435 U.S. at 860. While Section 3282 provides in part that defendants shall not be prosecuted and tried for crimes committed after the expiration of the limitations period, that right is not a "right not to be tried in the sense relevant to the *Cohen* exception," but is instead simply " 'a right whose remedy requires the dismissal of charges.' " *Midland Asphalt Corp.*, 109 S. Ct. at 1499 (quoting *United States* v. *Hollywood Motor Car Co.*, 458 U.S. at 269. *Midland Asphalt* therefore casts no doubt on the decisions of the courts of appeals that have rejected petitioner's position.[6]

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[6] On the merits of the statute of limitations claim, we believe that the district court was correct in holding (Pet. App. 34a-38a) that the superseding indictment was properly re-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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turned within the period permitted by 18 U.S.C. 3288. "Allowing a second indictment to remedy legal deficiencies present in the first is the very purpose for which § 3288 was enacted." *United States* v. *Charnay*, 537 F.2d 341, 354 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).

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